

FCC MAIL SECTION

Federal Communications Commission

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**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of

Amendment of Part 90 of the  
Commission's Rules To Provide  
for the Use of the 220-222 MHz Band  
by the Private Land Mobile Radio Service

PR Docket No. 89-552 ✓

Implementation of Sections 3(n) and 332  
Of the Communications Act

GN Docket No. 93-252

Regulatory Treatment of Mobile Services

Geographic Partitioning and spectrum  
Disaggregation for the 220-222 MHz Service

**MEMORANDUM OPINION AND ORDER**

Adopted: March 15, 2000

Released: March 29, 2000

By the Commission:

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## I. INTRODUCTION

1. On August 4, 1998, we adopted rules for geographic partitioning<sup>1</sup> and spectrum disaggregation<sup>2</sup> for the 220-222 MHz service (220 MHz service).<sup>3</sup> Petitions for Reconsideration of the *Fifth Report and Order* were filed by Rand McNally & Company (RMC) and Intek Global Corp. (Intek).<sup>4</sup> In this *Memorandum Opinion and Order*, we dismiss RMC's Petition to remove the references to Major Trading Areas (MTAs) and Basic Trading Areas (BTAs) in the 220 MHz partitioning rules. In addition, we deny Intek's Petition to amend the construction requirements applicable to partitioned and disaggregated licenses. Finally, we correct Section 90.1019 of the Commission's rules to make it consistent with the construction rule adopted in the *Fifth Report and Order*. Our goal in taking these actions is to promote more efficient use of the spectrum, increased opportunities for a variety of entities to participate in the provision of 220 MHz service, and expedite delivery of 220 MHz service to unserved areas.

## II. BACKGROUND

2. On March 12, 1997, we adopted the *Third Report and Order*, which established rules for the operation and licensing of the 220-222 MHz band.<sup>5</sup> These rules were adopted to establish a flexible regulatory framework that would allow for the efficient licensing of the 220 MHz service, eliminate unnecessary regulatory burdens on both Phase I and Phase II licensees,<sup>6</sup> and enhance the competitive potential of the 220 MHz service in the mobile services marketplace.<sup>7</sup> *The Fifth Notice of Proposed*

<sup>1</sup> Partitioning is the assignment of geographic portions of a licensee's authorized service along geopolitical or other geographic boundaries.

<sup>2</sup> Disaggregation is the assignment of discrete portions or "blocks" of spectrum licensed to a geographic licensee or qualifying entity.

<sup>3</sup> See Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Geographic Partitioning and Spectrum Disaggregation for the 220-222 MHz Service, *Fifth Report and Order*, 13 FCC Rcd. 24615 (1998) (*Fifth Report and Order*).

<sup>4</sup> RMC filed a Petition for Reconsideration (RMC Petition) on October 13, 1998. Intek filed a Petition for Reconsideration (Intek Petition) on October 15, 1998.

<sup>5</sup> See Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Third Report and Order*; *Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd. 10943 (1997).

<sup>6</sup> Licensees granted initial authorizations for operations in the 220-222 MHz band from among applications filed on or before May 24, 1991, are referred to as "Phase I" licensees. Licensees granted initial authorizations for operations in the 220-222 MHz band from among applications filed after May 24, 1991, are referred to as "Phase II" licensees.

<sup>7</sup> *Third Report and Order*, 12 FCC Rcd. at 10948, ¶ 3.

*Rulemaking (Fifth NPRM)*, released with the *Third Report and Order*, proposed that any holder of a covered Phase II license<sup>8</sup> would be permitted to partition portions of its license.<sup>9</sup> The *Fifth NPRM* also sought comment on whether to permit full geographic partitioning and spectrum disaggregation in the 220 MHz service.<sup>10</sup> In the *Fifth Report and Order*, we adopted full partitioning and disaggregation rules for the 220 MHz service similar to those previously established for other services, *e.g.*, Broadband PCS, Multipoint Distribution Service (MDS), 800 MHz and 900 MHz Specialized Mobile Radio (SMR), 39 GHz fixed point-to-point microwave, the Wireless Communications Service (WCS), Local Multipoint Distribution Service (LMDS) and Maritime Services. Partitioning and disaggregation follow the general partitioning and disaggregation framework adopted for other wireless services.<sup>11</sup> These rules permit all 220 MHz service licensees, with the exception of Public Safety and Emergency Medical Radio Service (EMRS) licensees, to partition and disaggregate their licenses. Partitioning is permitted based on any geographic area defined by the parties, provided that the parties notify the Commission regarding the relevant boundaries and coordinates. Disaggregation is allowed for any amount of 220 MHz spectrum, with no requirement that the disaggregator retain a certain amount of spectrum if the disaggregation is otherwise consistent with the Commission's rules.

3. The 220 MHz partitioning and disaggregation rules allow Phase II licensees to partition and disaggregate at any time after receiving their license. Phase II licensees may negotiate with their partial assignees how the construction requirements will be met after partitioning and disaggregating their license. Two options are provided for satisfying the construction requirements. Under option one, the assignee can certify that it will satisfy the construction requirements for its area or spectrum, while the original licensee is responsible for the area or spectrum it retains. Under option two, either party can certify that it will meet the construction requirements for both licensees' combined licensed service area or spectrum.<sup>12</sup>

4. RMC requests that the Commission delete the reference to MTA and BTA designations in the Commission's rules. RMC argues that it holds the copyright for these terms and that it has not authorized their use in the 220 MHz service. Intek requests reconsideration of the Commission's post-partition/disaggregation construction requirements and proposes alternatives for our consideration.

### III. DISCUSSION

#### A. Available License Area

5. Background. The 220 MHz partitioning rules allow partitioning based on any area defined by the parties to the partitioning agreement.<sup>13</sup> Parties to the partitioning agreement are given the

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<sup>8</sup> There are two types of Phase II licenses: (1) "covered Phase II licenses" which were granted on an Economic Area (EA), Regional or nationwide basis, and (2) "non-covered Phase II licenses" which were granted on a site-specific basis and were to be used for Public Safety or Emergency Medical Radio Service (EMRS) under 47 C.F.R. § 90.720. See *Third Report and Order*, 12 FCC Rcd. at 11078, n.553.

<sup>9</sup> *Third Report and Order*, 12 FCC Rcd. at 11074, ¶ 308.

<sup>10</sup> *Id.* at 11079, ¶ 321.

<sup>11</sup> See *Fifth Report and Order*, 13 FCC Rcd. 24615 (1998).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

option to define the partitioned area by: (1) county lines, (2) FCC recognized service areas, or (3) coordinate points at every three degrees. In the *ULS Report and Order*,<sup>14</sup> the Commission amended Section 90.1019(b) of the rules to eliminate any reference to Major Trading Area (MTA) and Basic Trading Area (BTA) as FCC recognized areas for 220 MHz partitioning purposes.

6. Discussion. RMC requests that Section 90.1019 of the Commission's rules be amended to remove the reference to MTAs and BTAs as FCC recognized areas for partitioning purposes. RMC further requests that we clarify that 220 MHz licensees are not permitted to use MTA and BTA designations to define a service area in connection with their partitioning agreements without RMC's consent.<sup>15</sup> RMC asserts that it is the copyright owner of the MTA and BTA designations and that it has entered into licensing agreements for the use of these designations in connection with the licensing of certain services.<sup>16</sup> However, RMC notes that there is no licensing agreement for use of MTA and BTA designations in the 220 MHz service. In the absence of a licensing agreement applicable to 220 MHz, RMC argues that it is improper for the 220 MHz partitioning rules to refer to MTAs or BTAs as FCC recognized areas in this service.

7. We recognize that RMC holds the copyright for the MTA and BTA designations. In those services in which we have used MTAs and BTAs to define initial geographic licensing areas (e.g., PCS, 900 MHz SMR), RMC has entered into service-specific licensing agreements with industry participants in the service to authorize licensee use of the copyrighted terms.<sup>17</sup> In the case of the 220 MHz service, however, Section 90.1019 has been amended to remove the reference to partitioning by MTAs and BTAs.<sup>18</sup> Accordingly, we dismiss RMC's Petition as moot.

## B. Post-Assignment Construction

8. Background. The construction requirements imposed on covered Phase II licensees and assignees after a 220 MHz license has been partitioned or disaggregated are based on the construction requirements previously adopted for partitioning and disaggregation by broadband PCS licensees. Phase II licensees are given two options for satisfying the Commission's construction requirements after partitioning and disaggregating: (a) a licensee and assignee may agree to be individually responsible for satisfying the construction requirements for their respective portions of the partitioned or disaggregated license; or (b) one party may certify that it will be responsible for satisfying the construction requirements for the entire market.<sup>19</sup> If the first option is selected and either licensee fails to meet the

<sup>14</sup> See *In the Matter of Biennial Regulatory Review - Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97 and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services*, Report and Order, 13 FCC Rcd 21027 (1998) (*ULS Report and Order*).

<sup>15</sup> RMC Petition at 1-2.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See 47 C.F.R. § 90.1019(b).

construction requirement for its portion of the partitioned or disaggregated license, both parties' licenses will be subject to automatic cancellation.<sup>20</sup> If the alternative option is selected, i.e., one party certifies that it will be responsible for meeting all future construction requirements for the original license, and that party fails to meet the requirement, its license will be subject to automatic cancellation, but the non-certifying party's license will not be affected if it demonstrates that it is providing "substantial service" for its partitioned area or disaggregated spectrum.<sup>21</sup>

9. Discussion. Intek contends that the 220 MHz construction requirements will deter 220 MHz Phase II licensees partitioning their licenses to assignees who are small businesses.<sup>22</sup> According to Intek, small businesses are most interested in partitioning their 220 MHz licenses, and they will be reluctant to partition their licenses to other small businesses, who are less likely to meet their construction obligations, as compared to well established companies from whom recourse is available.<sup>23</sup> Intek suggests that the Commission consider two alternatives for satisfying the Commission's construction requirements. One option would permit the partitioner and partitionee to separately satisfy the construction requirements upon a demonstration of the bona fide nature of the partitioning request. The second option would permit the partitioner and partitionee to avoid the construction requirements if partitioning occurs before a specific date (e.g., within three years of license grant). For the reasons discussed below, we decline Intek's request.<sup>24</sup>

10. Intek offers little evidence to support its argument that small business 220 MHz licensees are unlikely to partition their licenses to other small businesses. Although Intek points out that all but seven of the bidders in the 220 MHz Phase II auction qualified for small or very small business bidding credits, and therefore almost all of the 220 MHz licensees are small businesses, we note that a significant number of the 220 MHz Phase II licenses awarded actually are held by licensees that are not small businesses.<sup>25</sup> The record fails to demonstrate that these non-small business 220 MHz Phase II licensees would have the same concerns about partitioning their licenses to small businesses. Absent a definitive showing that the Commission's construction requirements are hampering partitioning by 220 MHz licensees, we are reluctant to make any changes to these requirements.

11. We are not convinced that Intek's proposed alternatives represent an improvement over the Commission's existing post-assignment construction requirements. Intek's first alternative is that upon a demonstration of the bona fide nature of the partitioning request, the Commission should permit

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<sup>19</sup> *Broadband PCS R&O*, 11 FCC Rcd. 21831.

<sup>20</sup> See 47 C.F.R. §§ 90.767, 90.769, 90.1019(d). See also *Fifth Report and Order* at 24634, ¶ 24.

<sup>21</sup> See 47 C.F.R. Sec. 90.1019(d)(1)(ii).

<sup>22</sup> Intek Petition at 3. Intek notes that only 7 of 54 bidders in the Phase II 220 MHz service auctions did not qualify for small or very small business bidding credits.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 4-5.

<sup>25</sup> Out of 915 220 MHz covered Phase II licenses awarded, non-small businesses received 385 of the licenses, including two nationwide licenses, or approximately 42 percent of the covered 220 MHz Phase II licenses awarded. See FCC, Wireless Telecommunications Bureau 220 MHz Fact Sheet (auction #18 and #24) at <http://www.fcc.gov/wtb/auctions/220/220fact.html>.

the licensee and partitionee separately to satisfy the construction requirements for their retained licensed areas.<sup>26</sup> Unlike the existing rules, which contain primarily objective criteria for the Commission to decide whether the construction requirements have been satisfied by a partitioner or partitionee, Intek's proposal requires the Commission to make a fact specific, case by case determination that the partitioning request is of a "bona fide nature" before the partitioner and partitionee may separately satisfy the construction requirements. Intek suggests no criteria for how the Commission should make this determination. Moreover, while the existing rules provide licensees and assignees with an incentive to build out their networks, i.e., failure to satisfy the construction requirements could result in license cancellation, Intek's proposal would eliminate this build out incentive. For these reasons, we find that Intek's first alternative does not serve the public interest.

12. Intek's second alternative would permit a licensee and partitionee to be able to avoid the post-assignment construction requirements if partitioning occurs before a specific date (e.g., within three years of license grant).<sup>27</sup> Intek does not suggest or justify a specific date, or range of dates, by which time partitioning must occur. Moreover, we are concerned that the proposal is likely to result in licensees and partitionees enjoying the benefits of partitioning without the burdens. Because licensees and partitionees could avoid the post-assignment construction requirements, the proposal is likely to stimulate partitioning activity early in the license term. This might facilitate greater participation by small business partitionees interested in tailoring their 220 MHz services to meet the more specialized needs of areas that otherwise would not be served as rapidly or remain unserved by incumbent licensees.<sup>28</sup> This benefit is outweighed, however, by the disincentive the proposal creates for licensees and partitionees to actually build out their networks in their respective service areas once partitioning occurs. Without the obligation to satisfy post-assignment construction requirements, the proposal offers no assurance that licensees and partitionees would continue to build out their networks after partitioning to serve those unserved areas within their respective service areas. Consequently, we find that Intek's second alternative does not serve the public interest.

### C. Post- Assignment Construction Rule Correction

13. In the *Fifth Report and Order*, we determined that, under option two of our post-assignment construction requirements, one party may certify that it will meet the construction requirements for the entire licensed service area or spectrum.<sup>29</sup> This decision was inadvertently not incorporated in Section 90.1019(d)(1)(ii) of the Commission's rules. Accordingly, on our own motion, we correct Section 90.1019(d)(1)(ii) of the Commission's rules to be consistent with our decision in the *Fifth Report and Order*.

## IV. CONCLUSION

14. For the reasons discussed above, we dismiss Rand McNally's Petition, deny Intek's Petition, and correct the Commission's rules as set forth in Appendix B. As we have previously stated,

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<sup>26</sup> Intek Petition at 4.

<sup>27</sup> *Id.* at 4-5.

<sup>28</sup> *Fifth Report and Order*, 13 FCC Rcd. at 24647.

<sup>29</sup> *Id.*

our goal in taking these actions is to allow for more efficient use of the spectrum, increased opportunities for a variety of entities to participate in the provision of 220 MHz service, and expedite delivery to unserved areas.

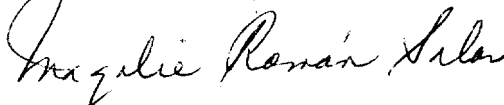
#### V. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED THAT, pursuant to Sections 4(i), 302, 303(r), and 332(a)(2) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 302, 303(r), and 332(a)(2), the Petition for Reconsideration filed on October 13, 1998, by Rand McNally & Company IS DISMISSED.

16. IT IS FURTHER ORDERED THAT, pursuant to the authority of Sections 4(I), 257, 303(g), 303 (r), and 332(a) of the communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 302, 303(r), and 332(a)(2) the Petition for Reconsideration filed on October 15, 1998, by Intek Global Corporation IS DENIED.

17. IT IS FURTHER ORDERED THAT, the rule correction adopted herein SHALL BECOME EFFECTIVE sixty days after date of publication in the Federal Register. This action is taken pursuant to Section 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas  
Secretary

**APPENDIX A**  
**LIST OF PETITIONERS**

Comments

Intek Global Corporation  
Rand McNally & Company



**APPENDIX B****FINAL RULES**

Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 90.1019(d)(1)(ii) is revised as follows:

*(d) Construction Requirements.*

\* \* \* \*

(ii) One party may certify that it has or will meet its five-year construction requirement and will meet the ten-year construction requirement, as set forth in Sections 90.767 or 90.769, as applicable, for the entire license area. In that case, the other party must only satisfy the requirements for "substantial service," as set forth in Sec. 90.743(a)(1), for the partitioned license area by the end of the original ten-year license term of the licensee.

## APPENDIX C

## SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY ANALYSIS

*Memorandum Opinion and Order on Reconsideration*

As required by section 603 of the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Third Report & Order; Fifth Notice of Proposed Rulemaking (Fifth NPRM)* in PR Docket No. 89-552, RM-8506. The Commission sought written public comment on the proposals in the *Fifth NPRM*, including the IRFA. The Final Regulatory Flexibility Analysis (FRFA) was incorporated in the *Fifth Report and Order (Fifth R&O)*. The Commission's Supplemental Final Regulatory Flexibility Analysis (SFRFA) in this *Memorandum Opinion and Order on Reconsideration (MO&O)* conforms to the RFA, as amended by the Contract With America Advancement Act of 1996.<sup>30</sup>

**A. Need for and Purpose of this Action:**

In the *MO&O*, the Commission modifies Section 90.1019 of the Commission's rules to delete the reference to Major Trading Area (MTA) and Basic Trading Area (BTA) designations which are used in the rule to define the service area for partitioned licenses. The *MO&O* further corrects Section 90.1019(e)(1)(ii) of the Commission's rules to make it consistent with the construction rule adopted in the *Fifth R&O*.

**B. Summary of Issues Raised in Response to the Final Regulatory Flexibility Analysis:**

None of the commenters submitted comments that were specifically in response to the FRFA.

**C. Description and Number of Small Entities Involved**

The rules adopted in the *MO&O* will affect all small businesses which avail themselves of these rule changes, including small businesses that obtained 220 MHz licenses through auction and subsequently decide to partition or disaggregate, and small businesses who may acquire licenses through partitioning and/or disaggregation.

**D. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements:**

The reporting, recordkeeping and other compliance requirements in the *MO&O* do not modify those established in the FRFA.

**E. Steps Taken to Minimize Burdens on Small Entities:**

The *MO&O* does not affect any of the steps taken to minimize burdens on small entities established in the FRFA. Intek Global Corporation (Intek) raises the argument that because most of the bidders for 220 MHz spectrum are eligible for small business credits, they may be unwilling to partition

<sup>30</sup> Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAA, Subtitle II of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) *codified at* 5 U.S.C. § 601 *et seq.*)

licenses to other small businesses, who may have difficulty complying with the Commission's build-out requirements. Intek suggests alternative build-out requirements for 220 MHz licensees. The *MO&O* rejects this argument because a significant number of 220 MHz licensees are not small businesses and there is no definitive showing that there will be a disincentive to partition licenses to small businesses.

#### **F. Significant Alternatives Considered and Rejected:**

The Commission considered and rejected the following alternative proposals concerning 220 MHz partitioning and disaggregation.

Intek suggests that the Commission consider two alternatives for satisfying the Commission's construction requirements. Intek's first alternative is that upon a demonstration of the bona fide nature of the partitioning request, the Commission should permit the licensee and partitionee separately to satisfy the construction requirements for their retained licensed areas. Unlike the existing rules, which contain primarily objective criteria for the Commission to decide whether the construction requirements have been satisfied by a partitioner or partitionee, Intek's proposal requires the Commission to make a fact specific, case by case determination that the partitioning request is of a "bona fide nature" before the partitioner and partitionee may separately satisfy the construction requirements. Intek suggests no criteria for how the Commission should make this determination. Moreover, while the existing rules provide licensees and assignees with an incentive to build out their networks, i.e., failure to satisfy the construction requirements could result in license cancellation, Intek's proposal would eliminate this build out incentive. For these reasons, the *MO&O* finds that Intek's first alternative does not serve the public interest.

Intek's second alternative would permit a licensee and partitionee to be able to avoid the post-assignment construction requirements if partitioning occurs before a specific date (e.g., within three years of license grant). Intek does not suggest or justify a specific date, or range of dates, by which time partitioning must occur. Moreover, Intek's proposal is likely to result in licensees and partitionees enjoying the benefits of partitioning without the burdens. Because licensees and partitionees could avoid the post-assignment construction requirements, the proposal is likely to stimulate partitioning activity early in the license term. This might facilitate greater participation by small business partitionees interested in tailoring their 220 MHz services to meet the more specialized needs of areas that otherwise would not be served as rapidly or remain unserved by incumbent licensees. This benefit is outweighed, however, by the disincentive the proposal creates for licensees and partitionees to actually build out their networks in their respective service areas once partitioning occurs. Without the obligation to satisfy post-assignment construction requirements, the proposal offers no assurance that licensees and partitionees would continue to build out their networks after partitioning to serve those unserved areas within their respective service areas. Consequently, the *MO&O* concludes that Intek's second alternative does not serve the public interest.

#### **G. Report to Congress**

The Commission shall include a copy of this Supplemental Final Regulatory Flexibility Analysis, along with this *MO&O*, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A).